IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3308 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KAMLESH R BHRAMBHATT

Versus

MAHEMDABAD EDUCATION SOCIETY

Appearance:

1. Special Civil Application No. 3308 of 2001

MISS SEJAL SUTARIA FOR MR VH DESAI for the Petitioner.

MR SHAILESH C PARIKH for Respondent No. 1-2

MR.M.S. RAO, ASSISTANT GOVERNMENT PLEADER for Respondent No. 3

MR MITUL K SHELAT for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 19/03/2004

ORAL JUDGEMENT

The present petition is filed being aggrieved of the judgement and order dated 20.10.2000 of the Gujarat Affiliated Colleges Services Tribunal at Ahmedabad (hereinafter referred to as "the Tribunal") in Application No.45 of 1999.

2. The facts of the case are that the petitioner was appointed by order dated 12.06.1997 with effect from 01.07.1997 as a Full Time Lecturer, a copy of the said order is at Annexure 'A' to this petition. One of the conditions on which the said appointment given was that, "the appointment for the academic year 1997-98 effective from 01.07.1997 will be on probation for one year." It is also on record that the petitioner was given the post of Principal on 01.07.1997 and he was to discharge the duties of the Principal and was get the admissible allowances for the same. The services of the petitioner were then extended for one year continuing him on probation. This was communicated to the petitioner by Office Order dated 25.05.1998. Thereafter, by communication dated 28.04.1999 the management brought to an end the services of the petitioner on the ground that his performance was not found satisfactory. The petitioner was paid the notice pay along with the aforesaid communication by a cheque of Rs.7485/-. This order dated 28.04.1999 was challenged before the Tribunal on various grounds, mainly, on the ground that the order is punitive in nature and that under section 14 of the Gujarat Affiliated College Services Tribunal Act, 1982 (hereinafter referred to as "the Act") necessary approval which is required to be obtained from the Vice Chancellor was not obtained. The petitioner relied upon various decisions, which are enumerated in para 7 by the learned Judge of the Tribunal with a remark that the said judgements are not applicable to the facts of the petitioner.

3. The matter was contested before the Tribunal by the management contending that the order dated 28.04.1999 is not a punitive one, but it is an order of "discharge simpliciter". It was also contended that on a plain reading of section 14 of the Act, it is not applicable to a probationer and therefore, there was no question of obtaining an approval from the Vice Chancellor.

4. The learned advocate appearing for the petitioner strenuously contended that the order terminating the services of the petitioner though couched in innocuous terms it is 'punitive' in nature, and therefore, the

Court should lift the veil to ascertain the reasons for passing the order. In this regard the learned advocate relied upon a decision of this Court in the matter of Dilipsinhji D. Rathod Vs. Vijaysinh Parmar, reported in 1991 (2) GLR 1307. The Court having dealt with various contentions raised by the learned advocate for the petitioner has recorded in para 6 of that judgement, has observed as under in para 8, which is relevant for our purpose,

> "Undoubtedly, in this case also the order of termination in the sense in which the Division Bench of this Court has described the order of termination is a non speaking order inasmuch as it does not state any reason as to why the services of the petitioner were terminated. However, in my opinion, it is permissible for the Court to find out the reasons by referring to the affidavit in reply and that was the exercise undertaken by the Division Bench of this Court in the case of Anopsinh Jatubha (supra). If that exercise is undertaken in this case two fold reasons are given by the respondents, i.e. (i) the work of the petitioner was unsatisfactory and (ii) on enquiry he was found not upto the mark and his conduct on a particular occasion was unbecoming of a Government servant. .. .."

5. The learned Judge also referred to a decision of the Honourable the Apex Court in the case of Anoop Jaiswal Vs. Government of India and another, reported in A.I.R. 1984 SC 636, wherein the Honourable the Apex Court, in para 12, has observed as under.

> "It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

6. The learned advocate for the petitioner also relied upon a decision of this Court in the matter of Mahuva Kelavani Sahayak Samaj & others Vs. Rasiklal K. Joshi & another, reported in 1997 (1) GLR 508, to contend

that section 14 of the Act will be applicable not only to the cases of termination covered under the expression of dismissal or removal but will also be applicable to the cases of termination covered under "be otherwise terminated".

7. The learned advocate Mr.Parikh appearing for the respondent management submitted that in the subject matter of cessation of services of the petitioner the only thing which is required to be looked into and examined is the 'order of termination'. If the 'order of termination' does not bear any stigma being attached to the employee, no interference is called for. The learned advocate emphatically submitted that the fact that appointment of the petitioner was on probation, it was on 'trial and error' basis and the fact that the services of the petitioner were required to be extended for a further period of one year on probation it is clear that the performance of the petitioner was not found satisfactory at least in the first year. That is why the period of probation was required to be extended for one more year. Now if at the end of the extended period if the services of the petitioner are terminated by saying that, 'having found your performance unsatisfactory during the period of probation your services are brought to an end with effect from 28.04.1999', the order can be read only as an order of 'discharge simpliciter'. He submitted that the material, which is placed either before the Tribunal or before this Court, by way of an affidavit, in response to an inquiry as to why the services of probationer were not found satisfactory, cannot be read into the order under scrutiny. In this regard Mr.Parikh, the learned advocate relied upon a judgement of a Division Bench of this Court in the matter of State of Gujarat Vs. N.M. Khan, reported in 1999(2) GLR 1355. He submitted that the Division Bench has relied upon a judgement of the Honourable the Apex Court in the matter of State of Orissa Vs. Ram Narayan Das, reported in A.I.R. 1961 SC 1777, which is quoted in para 6 of the said judgement which is reproduced hereunder for ready reference:

> "6. In the case of State of Orissa V. Ram Narayan Das (AIR 1961 SC 177), Apex Court held that in case of a probationer, observations like unsatisfactory work and conduct would not amount to attaching stigma to the order. In the instant case, what is mentioned in the order is that services of the petitioner are terminated. Reading the order, it cannot be said that it attaches any stigma. Reference may be made to reported decisions of the Apex Court in the case

of Union of India Vs. R. S. Dhoba, reported in 1969 (3) SCC 603 and Harising Mann Vs. State of Punjab, reported in 1975 (3) SCC 182 wherein the words "found unsuitable" and "unfit for appointment" were not considered attaching stigma."

8. Mr.Parikh, the learned advocate submitted that the observations made by the Division Bench in para 7 are important for the purpose of this matter, which read as under:

"7. As the order was challenged, the action was required to be defended and the employe was required to give sufficient martial on the basis of which the employee was considered unfit for the job. However, on the basis of this material, it cannot be said that by way of penalty the employee's services came to be terminated. In a termination order simpliciter of a probationer, reasons are not to be given in the order and the care is to be taken that the order be as innocuous as it can be so that the employee may not carry any stigma. The order which is placed on record does not indicate any stigma and it is clear that it is an order of termination simpliciter. The learned single Judge considered the averments made in the affidavit on behalf of the State as a part of the order terminating the services of the respondent and came to the conclusion that attaches stigma. Learned Judge was required to consider the order of termination of a probationer and not the reasons disclosed in support of the action taken by the employer. We are of the opinion that on the basis of order of termination simpliciter which does not carry any stigma, the impugned order cannot sustain. The Apex Court in the case of Hukum Chand Khundia v. Chandigarh Administration & anr. 1995 (6) SCC 534, has pointed that:

"When the services of an employee was found unsatisfactory for the reasons indicated and since the employee was holding a temporary service and was on probation, the order of termination simpliciter has been passed without attaching any stigma against him, cannot be said to be a penal and no formal inquiry is required in such a case. The Court held that --- we do not think that

in reality, an order of punishment has been passed against the petitioner in the cloak or pretence of termination simpliciter without holding any departmental proceeding thereby violating Ar.311 of the Constitution. We therefore, find no merit in this petition and the same is dismissed."

9. Mr.Parikh, the learned advocate also relied upon a judgement of the Honourable the Apex Court in the matter of Pavenendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr., reported in 2002 LAB I.C. 113, wherein relevant observations are in para 21, which read as under:

"21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct (c) which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."

10. Mr.Parikh, the learned advocate submitted that in this view of the matter by taking into consideration the contents of 'the order' under challenge it is to be determined as to whether the order is 'punitive' or 'discharge simpliciter'. He submitted that the order which is under scrutiny contains nothing more than a fact that, 'the performance of the petitioner is not found satisfactory during his probation period' and hence cannot be termed as a 'punitive' one.

11. The controversy which is raised in this petition is raised before the Courts umpteen number of times. It is interesting to note that whenever service of a probationer is terminated, it is always complained that the order is punitive. It is also a routine thing that after the 'order' is challenged, the management is called upon to explain as to why the services are terminated. To justify its act of termination the management sets out the material on which it assessed the performance of the employee and came to the conclusion that the same is not satisfactory. Once such material is placed on record of the case then it is contended on behalf of the employee

that if these are reasons for which his services are terminated, then a regular inquiry ought to have been held. In the considered opinion of this Court this leads to a situation which destroys the very basis of appointing a person on probation. Whenever a person is appointed on probation it is always for the purpose of trying his suitability to the organisation. If without there being any reason a person is branded of having unsatisfactory performance, then that is alleged to be an arbitrary decision. When the reasons are set out it is contended that the termination is punitive. Thus, the purpose of 'appointing a person on probation' is lost. Therefore, it is right to hold that whenever a question of considering the nature of termination of a probationer is concerned what is required to be looked into is, 'the contents of the order terminating the services of the probationer and nothing beyond that'. Reasons, if any, set out by the management in response to a challenge to such an order should not be read into the order and on the basis of the contents of the affidavit in reply the order should not be branded as punitive order.

12. So far as applicability of section 14 of the Act is concerned the learned Judge of the Tribunal has considered the same and has rightly come to the conclusion that the same has no application to the facts of the present case because the case of the petitioner does not fall in any of the eventualities provided under section 14, namely, dismissal, removal or reduction in rank of college employees. So far as 'services otherwise terminated' is concerned, the same will apply only to the persons who are appointed on permanent basis. Therefore, the provisions of section 14 of the Act will have no application to the facts of the petitioner because he was appointed on probation and the management having found his performance to be unsatisfactory terminated his services.

13. In view of the foregoing discussion, the petition is dismissed. Rule is discharged. No order as to costs.

(Ravi R. Tripathi, J.)

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